

Supreme Court, U. S.

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No. 76-1373

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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CHARLES L. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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Petitioner challenges a determination by the Air Force Board for the Correction of Military Records not to correct alleged errors in certain of his Officer Effectiveness Reports (OERs). The Court of Claims denied him relief on this claim on November 12, 1976 (Pet. App.), and denied his petition for rehearing on January 7, 1977.

Petitioner is a former Captain in the United States Air Force Ready Reserve. He was separated from the service on August 26, 1971, after having twice been passed over for promotion to the rank of Major. The essence of his contentions here is that he was not selected for promotion

due to administrative errors made on his Officer Effectiveness Reports (OERs) and because he is a member of a minority group (Pet. App.).<sup>1</sup>

After being passed over for promotion in January 1969, petitioner filed an application with the Officer Personnel Record Review Board requesting invalidation of five OERs because of certain administrative errors such as the misspelling of his name. The Review Board denied the application in April 1970 (Pet. App.).

In June 1970, after again being passed over for promotion, petitioner applied to the Air Force Board for the Correction of Military Records. This application was denied because of insufficient evidence to establish error or probable injustice (Pet. App.).

In August 1971, petitioner brought an action in the United States District Court for the Northern District of Illinois to challenge the Board's denial of relief. The district court dismissed his complaint for lack of jurisdiction. The United States Court of Appeals for the Seventh Circuit affirmed (478 F. 2d 1406), and this Court denied certiorari (414 U.S. 1093).

The instant action was commenced in the Court of Claims in June 1975. The court granted summary judgment for the government and dismissed the case (Pet. App.).

<sup>1</sup>Petitioner does not indicate in his petition to what minority group he claims membership; however, an affidavit in the record of this case discloses that he is Jewish. Petitioner apparently did not pursue administrative avenues available to him for the resolution of his discrimination claim. See 29 Fed. Reg. 13968, 13970.

The judgment below is correct. As the Court of Claims stated, relying on decisions of this Court (Pet. App.):

Promotions are a matter of discretion with the military, and the courts are not in the promotion business. *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Brenner v. United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974).

A court cannot overturn a decision of the Board for Correction of Military Records concerning a promotion unless cogent and clearly convincing evidence is adduced to demonstrate that the Board's decision is arbitrary or capricious, or is not based on substantial evidence, or is contrary to applicable law or regulations. *E.g.*, *Dorf v. United States*, 200 Ct. Cl. 626, 633, certiorari denied, 414 U.S. 1032; *Cooper v. United States*, 203 Ct. Cl. 300, 304. Petitioner has made no such showing. As the Court of Claims noted, petitioner's contentions rest principally on certain alleged technical errors in his OERs, which the Board found to be non-prejudicial; disputes over such minor housekeeping matters do not justify judicial interference with a military personnel decision. *Pauls v. Secretary of the Air Force*, 457 F. 2d 294, 298 (C.A. 1).

Nor has petitioner shown an infringement of his constitutional rights. As the court of appeals stated in *Pauls v. Secretary of the Air Force*, *supra*, 457 F. 2d at 297:

It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason. *Reaves v. Ainsworth*, 219 U.S. 296 \* \* \*; *Orloff v. Willoughby*, 345 U.S. 83, 93-94 \* \* \*; *Cortright v. Resor*, 2 Cir., 447 F. 2d 245, 253-254; *Arnheiter v. Chafee*, 9 Cir., 435 F. 2d 691;

Muldonian v. United States, 432 F. 2d 443, 447, 193 Ct. Cl. 99; Payson v. Franke, 108 U.S. App. D.C. 368, 282 F. 2d 851, 854.

Moreover, petitioner has failed to show that his claim of discrimination has substance, and absent such a showing the claim does not warrant further review.<sup>2</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General.*

JULY 1977.

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<sup>2</sup>Petitioner's contention that the Court of Claims erred in not giving explicit consideration to all of his claims also is insubstantial. The court stated that it gave "thorough" consideration to the briefs and pleadings before ruling in the case. The court was not required to give a detailed explanation of its decision, and its summary disposition does not show that it did not properly consider the case.